Supreme Court U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-642

MAYHUE'S SUPER LIQUOR STORES, INC., a Florida corporation, and CARL L. MAYHUE, d/b/a MAYHUE'S SUPER LIQUOR STORES, INC.

Petitioners,

vs.

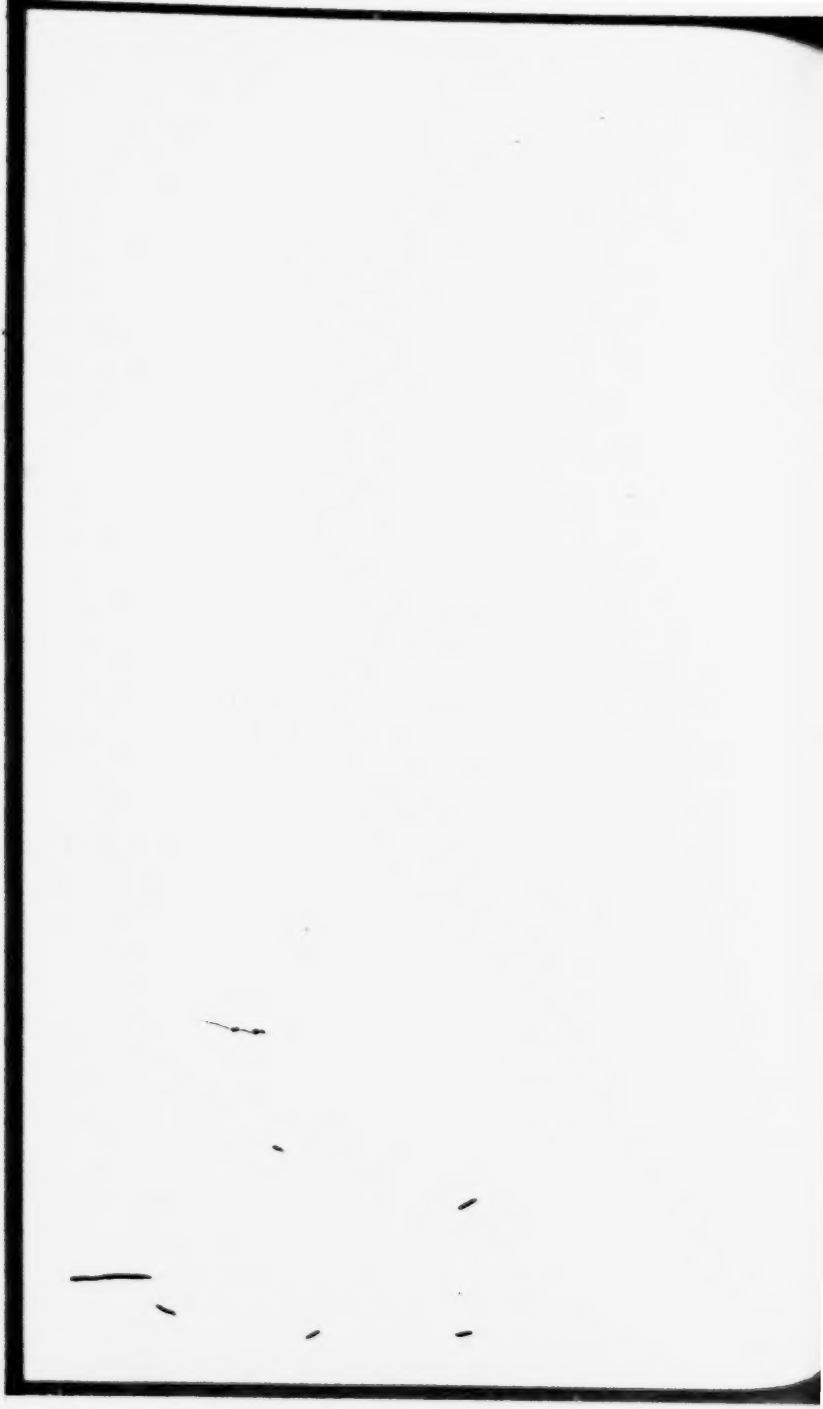
JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 871-4853 — 377-3721



INDEX TO PETITION

	Page
Opinion Below	2
Jurisdiction	2
Statutory Provisions and Regulations Involved	2
Statement of the Case	3
Proceedings Below	5
Reasons For Granting the Writ	7
Argument	8
Conclusion	21
Certificate of Service	22

TABLE OF CASES

	Page
Brooklyn Bank vs. O'Neil, 324 U.S. 697 (1945)	8, 14
Chicago Rock Island and Pacific Railway Company vs. Howell, 401 Fed. Reporter 2nd 752 (10th Circuit Court of Appeals 1968)	20
Coppage vs. Kansas, 35 Sup.Ct., 240, 236 U.S. 1 (1915)	7, 10
Lavender vs. Kurn, 327 U.S. 645 (1946)	17
Lochner vs. New York, 198 U.S. 45; 49 L.Ed. 935, 25 Sup.Ct., 539 (1905)	7, 9
Mugler vs. Kansas, 123 U.S. 623, 31 L.Ed., 205, 8 S.Ct., 283 (1887)	9
Shultz vs. Hinojosa, 432 F.2d 259 (5th Circuit 1970)	8, 14, 15
State Ex rel Fulton vs. Ives, 167 So. 394 (Fla. 1936)	10

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Petitioners,

vs.

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE PETITIONERS, MAYHUE'S SUPER LIQUOR STORES, INC., a Florida corporation, and CARL L. MAYHUE, d/b/a MAYHUE'S SUPER LIQUOR STORES, INC., respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 5, 1972.

OPINION BELOW

The opinion of the Court of Appeals not yet reported appears in the Appendix hereto, Page 1. The opinion was rendered on August 2, 1972.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 2, 1972, and the Petition for Re-Hearing was denied on September 5, 1972, and appears in the Appendix hereto, Page 8. This Court's jurisdiction is invoked under 28 USC, §1254(1). QUESTIONS PRESENTED:

1. Whether the District Court properly ruled in favor of the Petitioner in granting declaratory relief and holding that Plaintiffs' proposed agreement with employees in no way violates the provisions of the Fair Labor Standards Act.

2. Whether the Court of Appeals for the Fifth Circuit erred when it reversed the District Court and held that the proposed agreement with employees is invalid and violates the Fair Labor Standards Act and remanding to the District Court for further proceedings in connection with all matters in which the agreement for repayment of shortages was involved.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. Fair Labor Standards Act of 1938; Public Law #718; Chapter 676; Third Section Statute #2457.

2. 29 Code of Federal Regulations 778.

STATEMENT OF THE CASE

Petitioner is an individual doing business as MAYHUE'S SUPER LIQUOR STORES, INC., a Florida corporation and is a retail liquor dealer in Broward County, Florida, who had, at the time of the trial, in the Federal District Court in and for Miami, Florida, five retail liquor stores. During investigation of Petitioner by Agents of the Secretary, the Petitioner made a request of the Agents of the Secretary that the Petitioner be allowed to enter into an agreement with employees of the Petitioner whereby in the event of a cash register shortage the employees would voluntarily repay missing funds to the Petitioner within a reasonable period of time so long as the repayment was not deducted from the payroll. The Agents of the Secretary of Labor refused to allow the Petitioner to enter into such an agreement and informed the Petitioner that such an agreement would be in violation of the Fair Labor Standards Act of 1938 as Amended. Counsel for the Petitioner wrote, on October 17, 1969, to the Administrator of the Wage and Hour Division (A. 9) and requested a ruling on this Agreement, to-wit:

> "The employee agrees to voluntarily repay said missing funds to the employer within a reasonable period of time. The employer shall not deduct said shortages from the pay check of the employee. It is understood that said shortages are considered to be a valid debt owed to the employer."

The Administrator of the Wage and Hour Division answered in a letter dated October 23, 1969 (A. 9) and

stated that this agreement would be illegal and regardless of the fact the Attorneys for the Petitioner stated such repayments would not be involved in payroll deductions, the Administrator referred to such payment as "deductions."

Investigation by the Secretary led the Agents of the Secretary to believe that there were violations of the Fair Labor Standards Act being committed by the Petitioner, particularly in the record keeping provisions and failure to pay for all time worked. On December 9, 1969, the Petitioner filed a Petition for Declaratory Judgment under the Fair Labor Standards Act (A. 14) stating that the Secretary was incorrect in that the Fair Labor Standards Act (A. 22) stating that the Secretary was incorrect in that the Fair Labor Standards Act was inapplicable to the Petitioner's right to enter into the agreement with its employees with regard to repayment of cash shortages. The Petition also requested that the Secretary be restrained and enjoined from interfering with the right of the Petitioner to carry on its business and to have such an agreement with its employees. IT WAS NOT ALLEGED AND NOWHERE DOES IT APPEAR IN THE RECORD THAT THE PETITIONER MADE ANY DEDUCTIONS OR RECEIVED ANY REPAYMENTS OF SHORTAGES PURSUANT TO THE AGREEMENT PROPOSED TO THE SECRETARY IN THE LETTER OF OCTOBER 17, 1969 (A. 9).

Following the filing of the Petition, the Secretary filed an answer denying the right of the Petitioner to enter into such an agreement. The Secretary also filed a counterclaim for injunction against the Petitioner alleging

that the Petitioner had violated the provisions of §6 and 15A(2) of the Act by paying less than the minimum wage, by failing to pay overtime for work in excess of 40 hours, by failing to keep accurate records for wages and hours, and that Petitioner had repeatedly and willfully violated and was willfully violating the Act.

It was and is the contention of the Petitioner that the Declaratory Judgment action and the proposed agreement to be entered into between Petitioner and Petitioner's employees were and are separate and apart from any of the allegations and evidence contained in the counterclaim in behalf of the Secretary.

PROCEEDINGS BELOW

The Petitioner brought this action for declaratory relief under §28: 1331, U.S.C.A.; 28: 2201, U.S.C.A.; 28: 1343, U.S.C.A.; and 29: 201, U.S.C.A., and Rules 23A and 57 of the Federal Rules of Civil Procedure for the purpose of determining a question of actual controversy between the parties concerning the interpretation of Title 29 Part 778 of the Code of Federal Regulations under the Fair Labor Standards Act of 1938 as Amended. The case in chief on the Petition for Declaratory Judgment had virtually stipulated facts, and that was that the Petitioner proposed entering into the suggested contract. No evidence was put on during the case in chief of the Petitioner that any shortages had been repaid by either direct payment or indirect payment by the employee or by payroll deduction pursuant to the suggested agreement (A. 9). During the case on the counterclaim of the Secretary, certain allegations were made and evidence was brought forth that shortages had been repaid by employees but they had been

repaid pursuant to another agreement that was in no way similar to the suggested agreement in the Declaratory Judgment action. The other agreement, which is found on Page 341 of the Appendix (A. 14) provided as follows:

> "It is fully understood that I am responsible for shortages which occur in the cash register of which I am in charge, with the understanding that I am the sole operator of the particular cash register.
>
> "These are the terms and conditions of my employment, which are acceptable to me.
>
> "This will authorize you to deduct from any monies due me the amount of shortages which may occur."
>
> Signed_____
> (Signature)

Throughout the trial on the counterclaim the Petitioner maintained that it did not make payroll deductions for repayment of shortages under this agreement. The Secretary, through its witnesses, alleged that certain shortages were deducted pursuant to this agreement. The Lower Court ruled that the first proposed agreement as set forth in Counsel for Petitioner's letter of October 17, 1969 (A. 9) in no way violates the provisions of the Act.

IT IS UNCONTRADICTED IN THE RECORD, HOWEVER, THAT THE COUNTERCLAIMS OF THE SECRETARY CONTAINED NO TESTIMONY CONCERNING SHORTGAES OR DEDUCTIONS PURSUANT TO THE AGREEMENT PROPOSED IN THE ORIGINAL PETITION FOR DECLARATORY RELIEF. THE FIFTH CIRCUIT COURT OF APPEALS CONFUSED THIS ISSUE AND ASSUMED THAT EVIDENCE HAD BEEN HEARD CONCERNING THE FIRST PROPOSED AGREEMENT. IN FACT, THE FIFTH CIRCUIT COURT OF APPEALS WENT AS FAR AS REMANDING THE CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS IN CONNECTION WITH ALL MATTERS IN WHICH THE AGREEMENT FOR REPAYMENT OF SHORTAGES WAS INVOLVED. THERE IS NOTHING IN THE RECORD IN THE COURT BELOW SHOWING REPAYMENT FOR SHORTAGES UNDER THE AGREEMENT THAT THE PETITIONER SUGGESTED IN ITS PETITION FOR DECLARATORY JUDGMENT.

REASONS FOR GRANTING THE WRIT

The Fair Labor Standards Act of 1938 makes no reference to the suggested agreement that is the subject of the Petition for Declaratory Relief. Counsel for the Petitioner relied upon the constitutionally protected right to contract or liberty of contract as set forth in **Lochner vs. New York,** 198 U.S. 45; 49 L.Ed. 935, 25 Sup. Ct., 539 (1905) and **Coppage vs. Kansas,** 35 Sup.Ct., 240, 236 U.S. 1 (1915).

The Fifth Circuit Court of Appeals confused the counterclaims and the allegations concerning payroll de-

ductions with the suggested agreement in the Petition for Declaratory Relief. THE ONLY ISSUE IN THIS CASE IS WHETHER THE FAIR LABOR STANDARDS ACT PRECLUDES THE CONTRACT PROPOSED IN PETITIONER'S LETTER OF OCTOBER 17, 1969 (A. 9).

The Court erroneously relied upon **Shultz vs. Hinojosa**, 432 F.2d 259 (5th Circuit 1970) and **Brooklyn Bank vs. O'Neil**, 324 U.S. 697 (1945).

If the decision of the Fifth Circuit Court of Appeals is allowed to stand, there will be case law settling a crucial issue where the Court making the law has totally misinterpreted the evidence in the record in the trial court below. It is for these reasons that the Writ should be granted.

ARGUMENT

The Petitioner is not quarreling with the portion of the decision of the Fifth Circuit Court of Appeals which affirmed that portion of the Final Judgment of the Federal District Court that held that the Petitioner had willfully violated the Act. However, in the trial on the counterclaim the Petitioner steadfastly maintained that it had the right to enter into a "proposed" agreement with its employees. The Petitioner never stated nor did the Secretary ever state or even allege that the Petitioner had violated the Act with the use of the proposed agreement. In fact, the counterclaim for unpaid overtime and for repayment of shortages through payroll deductions was clearly separate and apart from the original request for approval of the Petitioner's proposed agreement.

The "liberty to contract" is considered both a freedom and a property right and is protected against arbitrary or unreasonable restraint.

> "The right to make legal contracts of all kinds without fraud or deception is not only a part of the Civil Liberty possessed by every individual who is sui juris but is both a liberty and a property right within the protection of the guarantees against the taking of liberty or property without due process of law." 16A CJS Constitutional Law, § 575.

Neither the State nor Federal Government may impose restraint upon this basic freedom and liberty. As far back as 1887 the Supreme Court of the United States warned of legislative or governmental limitations of this freedom. In **Mugler vs. Kansas**, 123 U.S. 623, 31 L.Ed. 205, 8 S.Ct., 283 (1887), Justice Harlan stated:

> "It does not follow that every statute enacted ostensibly for the promotion of these ends (police powers), is to be accepted as a legitimate exertion of the police powers of the state . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the safety, has no real or substantial relations to those objects or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby to give effect to the Constitution."

The reasonableness of the legislation in these areas was tested in **Lochner vs. New York**, 198 U.S. 45; 49

L.Ed. 935; 25 Sup. Ct. 539 (1905). Here a New York statute prohibiting employment in a bakery for more than sixty (60) hours in one week or ten (10) hours in one day was upheld on the rationale that it protected the health and welfare of citizens and of labor people. In the majority opinion of the Court Mr. Justice Peckham stated:

> "The statute necessarily interferes with the right of contracts between the employer and the employees concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution . . . The right to purchase or sell labor is part of the liberty protected by this amendment unless there are circumstances which preclude the right . . ."

The Florida Supreme Court has held that the citizen's right to pursue lawful business is property and the right to contract for personal service as a means for the acquisition of property is one of the privileges of a citizen of the United States of which he cannot be deprived without invading his right to liberty. **State Ex rel Fulton vs. Ives**, 167 So. 394 (Fla. 1936).

The classic case of **Coppage vs. Kansas**, 35 Sup.Ct., 240, 236 U.S. 1 (1915) still stands for the immovable concept that the right to contract cannot be taken from an employer without due process of law and without reason. This landmark case held that a Kansas statute of 1903, which would punish an employer for prescribing as

a condition of employment that the employee shall agree not to become a member of a labor organization, was repugnant to the due process clause of the Fourteenth Amendment and was to be void. Certainly, the law today precludes such "yellow-dog" contracts, but the verbiage in the opinion of Justice Pitney and of the dissenting opinion of Justice Holmes puts great weight at the importance of applying reason and care when depriving one of the property right to enter into a contract:

> "The principle is fundamental and vital. Included in the right of personal liberty and the right of private property-partaking of the nature of each —is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money. An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state."

> "In order to satisfy the constitutional requirement of due process, a state or federal statute, or municipal ordinance creating and defining an of-

fense and fixing the punishment therefor must be a reasonable exercise of power possessed by the federal, state or municipal legislative body enacting it, and must not arbitrarily and unreasonably prescribe that certain acts inherently and generally innocent shall constitute criminal offenses or make a classification which is purely arbitrary or unreasonable."

There is a great void of case law dealing with this concept of repaying cash shortages voluntarily. Counsel for the Secretary throughout the trial and in anticipation of his brief cites cases allegedly on point which deal with actual payroll deduction fact situations. There is no similarity because, as Judge Fay stated, the reason for his granting a declaratory judgment is that this is not a payroll deduction, but that this is a voluntary repayment of a cash shortage and, although the Secretary and his agents refuse to recognize the logic of this fact pattern, it is ever present.

Our American history has seen a great change in labor-management relations beginning in the 1850's when trade unionism began its move to better employees' working conditions. Indeed the need for such reform was evident and the culmination of the reforms arrived in the 30's with the Social Security Act in 1933, the Wagner Act in 1937 and the Fair Labor Standards Act in 1938.

Throughout the history management reluctantly acquiesced to the fact that the government and the employees, through their unions, were infringing more and more upon the rights of management to manage.

A new philosophy and concept of democracy, which added a new dimension to labor-management relations, brought forth the phenomenon of government's interference with management's right to run its business. Consistent with this social change certain "ground rules" arose. It became mandatory for employers to closely follow the "ground rules" as interpreted by field investigators called "compliance officers", who freely interpret the law with the help of interpretative bulletins and without the help of a judge, a jury, or the Congress. Such an interpretation was requested by Counsel for the Petitioner in his letter to the Wage-and-Hour Division Administrator on October 17, 1969, (A. 9). The answer to the letter (A. 12) speaks for itself. Judge Fay did no more than what the Administrator should have done in October of 1969. Now the blinders have been removed from the Commissioner and, in accordance with Judge Fay's Declaratory Judgment in favor of the Petitioner, the Commissioner must heed the warnings of the tax paying entrepreneur.

Throughout the trial of this cause compliance officer Reid stated the Secretary's position to be that the Secretary was not objecting to the concept of taking back moneys from employees at all, but he was applying a mathematical formula and labeling this act a payroll deduction and stating that the monies may not be repaid by the employees in this fashion if it is one day, one week or one year after the shortage has been discovered.

Judge Fay's words in Paragraph 7 on Page 8 of the Findings of Fact and Conclusions of Law (A. 30) leave no question as to the justice of the position taken by the Petitioner. Anything less than this position invites these employees to steal money from the Petitioner.

The Fifth Circuit Court of Appeals in its opinion of August 2, 1972, seemed to hold that **Brooklyn Bank vs. O'Neil, 324, U.S. 697 (1945)** and **Shultz vs. Hinojosa, 432 F.2d 259 (5th Circuit 1970)**, are controlling and deal with the question at bar. This is error. In the **Brooklyn Bank** case, an employee named O'Neil had overtime pay due him from the Bank. The Bank tendered him a check which did not include liquidated damages and the Bank also had O'Neil sign a release and waiver in consideration of having received the check. This is the "waiver" that the Secretary argued and that the Fifth Circuit Court of Appeals held is analogous to the so-called "waiver" in the case at bar. O'Neil waived his right to liquidated damages without advice of Counsel. In the fact pattern set forth in the Petition for Declaratory Judgment and the letter of the Petitioner of October 17, 1969 (A. 9) the employee waives nothing but is simply agreeing to repay cash shortages to the Petitioner voluntarily within a reasonable time. The verbiage in the **Brooklyn Bank** case is also of interest. The Court says on Page 24:

> "The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided . . . "

Indeed there is unequal bargaining power but it goes the other way in the case at bar. The Labor Department

provides free legal services for the employees who allegedly complained about the Petitioner. Not only does the Labor Department oppose the Petition for Declaratory Relief but through its counterclaims and its parading of witnesses throughout the trial, the Government succeeds in confusing the Appellate Court into believing that the alleged shortage deductions are directly connected with the proposed agreement in the Petition for Declaratory Relief. There is indeed unequal bargaining power here and that is that the Secretary has, at its disposal, free legal talent that it provides for the employees.

The Court in the Fifth Circuit Court of Appeals holds that **Shultz vs. Hinojosa**, 432 F.2d 259 (5th Circuit 1970) is controlling. The case is far afield and very distinguishable from the case at bar. The **Hinojosa** case deals with the question of deducting from minimum wages the cost of furnishing butcher knives and honing steel and specified articles of clothing as a condition of employment. Interestingly enough **Hinojosa** deals with direct deductions from payroll for these items. The Petitioner's case in the Declaratory Judgment action does not deal with payroll deductions but specifically precludes using the payroll deduction method. In Judge Fay's Judgment (A. 30):

> "With regard to plaintiffs' petition for a declaratory judgment against the Secretary, the court declares and concludes, as a matter of law, that the plaintiffs' agreement with its employees entrusted with money as set forth in paragraph 9 of the Findings of Fact, in no way violates the provisions of the Act. To hold otherwise would

amount to a "judicial invitation" to such employees to steal. Certainly the Act is not intended to prevent an employer from protecting his property, including assets in the form of cash. Such losses, however, should not be deducted from the employees pay whether wages are being paid in cash or by check. The agreement being approved by the court contemplates "voluntary" repayment by employees. Any contrary action by the employer would, in the court's opinion, violate the provisions of the Act."

The Fifth Circuit Court of Appeals has usurped the fact finding right of the trial court. On Page 6 of the Decision of August 2, 1972, (A. 5) the Court states the following:

"The 'judicial invitation' to steal argument is not persuasive. There is no evidence that MAYHUE'S shortages were the result of theft on the part of the cashiers or were in any way different from the usual losses which are to be expected where cashier-employees handle a large number of transactions. The agreement required repayment regardless of the reason for the shortages. If the agreement required only repayment of money that the employee himself took or misappropriated it obviously would not collide with the Act. As a matter of law the employee would owe such amounts to the employer, and as a matter of fact, the repayment of monies taken in excess of the money paid to the employee in wages would not reduce the

amount of his wages. This case is distinguishable from the situation where an employee has taken some money, has had the use of it, and is required to return it. In such a case there would be no violation of the Act because the employee has taken more than the amount of his wage and the return could in no way reduce his wage below the minimum."

Why does the Court assume that shortages are a necessary part of cashier operations? What facts in the record show this to be the case? This is clearly an assumption on the part of the Appellate Court which it has no right to make. Why would it be correct if the agreement required only repayment of money that the employee himself took or misappropriated? Why is this more correct than the agreement set forth by the Petitioner in its letter of October 17, 1969 (A. 9)? There is no answer for these questions.

The court has gone beyond the powers of the Appellate Court. In **Lavender vs Kurn**, 327 U.S. 645 (1946), this Court held that:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. In the Appellate Court's function as exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In the case at bar, the lower court had a non-jury trial. Therefore, Judge Fay was the Trier of facts as well as law. In the opinion of Judge Fay the agreement of the Petitioner as proposed to the Secretary did not violate the Fair Labor Standards Act. The Fifth Circuit Court of Appeals has taken it upon themselves to assume facts not in evidence and that is that the shortage repayments would include monies that were taken out of the register by someone other than the employee involved. There is nothing at all in the record concerning this presumption.

Further the Court imposes its reasoning and fact-finding on the Trial Court on page 6 of the Decision of August 2, 1972 (A. 6), when it says the following:

> "The voluntary-involuntary dichotomy is meaningless for two reasons. First, if the intent of the parties were to make repayment purely voluntary on the part of the employee, an agreement would not be necessary. The agreement would be pointless. Yet the employer requires the execution of the agreement as a condition of employment. Second, the provision in the agreement that the shortages are considered to be a valid debt owed to the employer obviously controls the matter and expresses the intent of the party. It overrides any argument that the repayment is voluntary on the part of the employee."

This is an invasion of the facts and of the reasoning of the trial court. The Appellate Court is here saying that there can be no such thing as a voluntary agreement between an employer and an employee! Perhaps if the

facts in the record showed that the Petitioner was an employer applying the standards of employee relationships applied in the 1850's and in the sweatshops of those years, there could be reason for this application of arbitrary appellate fact finding. There is none in this record and the Court is compelled to reverse the Fifth Circuit Court of Appeals.

Finally, the Appellate Court argues on Page 7 of the Decision of August 2, 1972 (A. 6):

> "With the employees' financial picture burdened with the valid debt of the shortages, he is receiving less for his services than the wage that is paid to him. Whether he pays the valid debt out of his wages or other resources, his effective rate of pay is reduced by the amount of such debt. When it is reduced below the required minimum wage the law is violated."

There is no logic in this argument as there is no answer to the question why is the effective rate of pay reduced? It has been made quite clear since the initial letter to the Secretary of October 17, 1969, (A. 10) that the Petitioner has no intention of deducting the shortages from payroll checks. It was made clear in the record that there would be, under the proposed agreement, no repercussions to the employee if he refused to pay this "valid debt". And yet the Fifth Circuit Court of Appeals arbitrarily says that there can be no voluntary agreement, that this is a payroll deduction even though the amount is not deducted from the pay check, and that the actual monies received by the employee are below the Federal minimum wage and in violation of the Fair Labor Standards Act of 1938 as amended.

In Chicago Rock Island and Pacific Railway Company vs. Howell, the Tenth Circuit Court of Appeals in 1968, 401 Fed.Reporter 2nd 752, stated that it would not superimpose its secondhand judgment of the trial court unless it could say from its objective appraisal of all of the facts and circumstances that the judgment of the lower court is clearly wrong.

In this case the Fifth Circuit Court of Appeal has superimposed its secondhand judgment on Judge Fay's objective appraisal of the facts before him. It has clearly committed error.

The decision of the Court of Appeals in the instant case is not only clearly erroneous, but it has opened the door to further erroneous decisions because of the misunderstanding of the facts in the case at bar. As stated above, the Fifth Circuit Court of Appeals assumed that the allegations of the Secretary in the counterclaim concerning alleged payroll violations and overtime violations and alleged shortages deductions from paychecks were connected in some way with the proposed agreement for voluntary shortage repayment in the main case-in-chief on the Petition for Declaratory Judgment. In misunderstanding this and ordering that the case be remanded to the District Court for further proceedings in connection with all matters in which the agreement for repayment of shortages was involved, the Court will confuse future litigence on this question, if this question is put to rest based upon a misunderstanding of the facts before the Court then future litigence concerning questions under Fair Labor Standards Act of 1938 as amended will suffer from the confusion.

CONCLUSION

It is for these reasons that a Writ of Certiorari should be issued by the Supreme Court of the United States to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

JAMES V. JOHNSTONE, ESQUIRE
Counsel for the Petitioners
420 Lincoln Road; Suite 244
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT was mailed to each of the following: Alfred G. Albert, Acting Solicitor of Labor; Carin Ann Clauss and Beverley R. Worrell, Regional Solicitors, Attorneys for the Secretary, United States Department of Labor, Room 4141 Main Labor, 14th & Constitution Avenue, N. W., Washington, D. C. - 20210; and Robert Rust, Esquire, United States Attorney, 300 Ainsley Building, Miami, Florida - 33130- this 5th day of October, 1972.

By _____
JAMES V. JOHNSTONE

FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-642

MAYHUE'S SUPER LIQUOR STORES, INC., a Florida corporation, and CARL L. MAYHUE, d/b/a MAYHUE'S SUPER LIQUOR STORES, INC.,

Petitioners,

vs.

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX TO APPENDIX

	Page
FINDINGS OF FACT AND CONCLUSIONS OF LAW — U.S. District Court for the Southern District of Florida	1-7
ORDER DENYING PETITION FOR REHEARING — U.S. Court of Appeals for the Fifth Circuit Court	8
EXHIBIT NO. 1 — Request made to the Wage & Hour Division — U.S. Department of Labor	9-11
EXHIBIT NO. 2 — Reply Denying Request by Wage & Hour Division — U. S. Department of Labor	12-13
PETITION FOR DECLARATORY JUDGMENT	14-22
FINDINGS OF FACT AND CONCLUSIONS OF LAW	23-32
EMPLOYMENT AGREEMENT OF MARY BARNHART	33

INDEX TO APPENDIX

Page

FINDINGS OF FACT AND CONCLUSIONS OF LAW — U.S. District Court for the Southern District of Florida 1-7

ORDER DENYING PETITION FOR REHEARING — U.S. Court of Appeals for the Fifth Circuit 8

EXHIBIT NO. 1 — Request made to the Wage & Hour Division — U.S. Department of Labor .. 9-11

EXHIBIT NO. 2 — Reply Denying Request by Wage & Hour Division — U. S. Department of Labor 12-13

PETITION FOR DECLARATORY JUDGMENT .. 14-22

FINDINGS OF FACT AND CONCLUSIONS OF LAW 23-32

EMPLOYMENT AGREEMENT OF MARY HANNAH 33

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2044

MAYHUE'S SUPER LIQUOR STORES, INC., ET AL,
Plaintiffs-Appellants-
Cross Appellees,

versus

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Southern District of Florida

(August 2, 1972)

Before TUTTLE, MORGAN and RONEY, Circuit Judges.

RONEY, Circuit Judge: An agreement that an employee will repay to his employer any shortages in money entrusted to him, when shortages occur through misappropriation, theft, or otherwise, violates the minimum wage requirements of the Fair Labor Standards Act to the extent that such required payments reduce below the minimum wage the amount of money and compensation which the employee receives. The district court held otherwise. We reverse.

Mayhue's Super Liquor Stores, Inc., a Florida corporation, owns and operates a chain of six retail liquor stores in Broward County, Florida, and is admittedly subject to the requirements of the Fair Labor Standards Act. Carl L. Mayhue, its president and sole stockholder, actively manages the affairs of the corporation, including the hiring and firing of employees and the setting of wage policies. The employees involved in this litigation are cashiers who worked for various periods of time at one or more of the six liquor stores.

This action was initiated by the corporation and Mayhue for a declaratory judgment as to the legality under the Fair Labor Standards Act of requiring employees, as a condition of employment, to sign agreements providing that the employees would make "voluntary" repayments of cash register shortages. The Secretary counterclaimed under Section 17 for an order restraining the continued withholding of unpaid minimum wages and overtime compensation resulting from two practices: (1) the voluntary repayment of shortages pursuant to the agreement, and (2) the performance of work which was required but not recorded on Mayhue's time records. He also sought an injunction against further violations on both scores.

The district court declared Mayhue's employment agreements to be valid under the Act. However, the court held that the employer had otherwise willfully violated the Act's minimum wage, overtime, and record-keeping provisions, enjoined such violations, and required restitution to certain named employees. Both parties appeal the judgment.

We reverse the judgment only with respect to the validity of that part of the employment agreement requiring repayment of cash register shortages.

I.

The right to a minimum wage under the Fair Labor Standards Act cannot be waived by agreement between the employee and his employer. Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945).[1] The critical question in this case is whether this agreement works such a waiver. The employer concedes that the wages paid to many employees would be below the minimum if the repayments made or required were deducted from the amount of the compensation.

---

[1] "The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act." 324 U.S. at 706-707. Following *Brooklyn Bank*, a number of cases have held that contractual understandings which have the effect of "circumventing or invading the command of the Wage and Hour Act" are invalid and unenforceable. *Mitchell v. Turner*, 286 F.2d 104 (5th Cir. 1960); *Wood v. Meier*, 218 F.2d 419, 420 (5th Cir. 1955); *Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951); *Mitchell v. Greinetz*, 235 F.2d 621, 625 (10th Cir. 1956); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2nd Cir. 1959).

The controlling provision of the agreement provides:

> "It is understood that the employee is responsible for any money entrusted to him. Any shortages that occur through misappropriation, theft, or otherwise, shall be voluntarily repaid by the employee to the employer. In executing this contract at the time of employment, it is understood by both parties that the employee is the sole and only person using or entering into the safe, cash deposit box, or sole operator of a cash register.
>
> The employee agrees to voluntarily repay said missing funds to the employer within a reasonable period of time. The employer shall not deduct said shortages from the paycheck of the employee. It is understood that said shortages are considered to be a valid debt owed to the employer.
>
> Any repaid debts caused by such shortages shall not be considered as part of the calculation of basic rates of employees and shall not be used to determine whether the employee has received pay amounting to less than the Federal minimum wage.
>
> Basic rates, used for calculation of overtime pay, shall not be reduced as a result of repayment of such debts. Said debt repayment is, for all purposes, unconnected with payroll procedures and are not to be considered as payroll deductions."

In holding that this agreement in no way violates the provisions of the Fair Labor Standards Act, the district court said that a contrary holding

> "would amount to a 'judicial invitation' to such employees to steal. Certainly the Act is not intended to prevent an employer from protecting his property, including assets in the form of cash. Such losses, however, should not be deducted from the employees pay whether wages are being paid in cash or by check. The agreement being approved by the court contemplates 'voluntary' repayment by employees. Any contrary action by the employer would, in the court's opinion, violate the provisions of the Act."

The "judicial invitation" to steal argument is not persuasive. There is no evidence that Mayhue's shortages were the result of theft on the part of the cashiers or were in any way different from the usual losses which are to be expected where cashier employees handle a large number of transactions. The agreement required repayment regardless of the reason for the shortages. If the agreement required only repayment of money that the employee himself took or misappropriated it obviously would not collide with the Act. As a matter of law the employee would owe such amounts to the employer, and as a matter of fact, the repayment of moneys taken in excess of the money paid to the employee in wages would not reduce the amount of his wages. This case is distinguishable from the situation where an employee has taken some money, has had the use of it, and is required to return it. In such a case there would be no violation of the Act because the employee has taken more than the amount of his wage and the return could in no way reduce his wage below the minimum.

The "voluntary-involuntary" dichotomy is meaningless for two reasons. First, if the intent of the parties were to make repayment purely voluntary on the part of the employee, an agreement would not be necessary. The agreement would be pointless. Yet the employer requires the execution of the agreement as a condition of employment. Second, the provision in the agreement that the "shortages are considered to be a valid debt owed to the employer" obviously controls the matter and expresses the intent of the parties. It overrides any argument that the repayments are voluntary on the part of the employee.

With the employee's financial picture burdened with the "valid debt" of the shortages, he is receiving less for his services than the wage that is paid to him. Whether he pays the "valid debt" out of his wages or other resources, his effective rate of pay is reduced by the amount of such debts. When it is reduced below the required minimum wage, the law is violated. Of particular relevance in this regard are the Regulations found in 29 CFR §531.35 which provide:

> " 'Free and clear' payment; 'kickbacks.' Whether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.' The wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash . . ."

We have said that these regulations are entitled to controlling weight. Cf. Shultz v. Hinojosa, 432 F.2d 259 (5th Cir. 1970).

We agree with the Secretary that this agreement tended to shift part of the employer's business expense to the employees and was illegal to the extent that it reduced an employee's wage below the statutory minimum. This amounts to nothing more than an agreement to waive the minimum wage requirements of the Fair Labor Standards Act. Such an agreement is invalid. The case must be remanded to the district court for further proceedings in connection with all matters in which the agreement for repayment of shortages was involved.

II.

We have carefully reviewed the record in considering the other issues raised by both parties and find sufficient evidence to support the findings of fact and conclusions of law of the district court on each. See Capitol Tomato Co. v. Goldberg, 308 F.2d 401 (5th Cir. 1962).

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

September 5, 1972

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

TO ALL PARTIES LISTED BELOW

Re: No. 71-2044 — Mayhue's Super Liquor Stores, Inc., et al, vs. James D. Hodgson, Secretary of Labor, United States Department of Labor

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay on the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Alvis M. Winchester
Deputy Clerk

cc:amw Mr. James V. Johnstone
Mr. Ronald Gaswirth
Mr. Clemens Hagglund
Mr. James D. Henry

EXHIBIT NO. 1

[879] Law Offices
JAMES V. JOHNSTONE

Suite 244
420 Lincoln Road
Miami Beach, Florida 33139

(305) 531-8156

October 17, 1969

Administrator
Wage and Hour Division
U. S. Department of Labor
Washington 25, D. C.

Gentlemen:

In behalf of my client, Mayhue's Super Liquor Stores of Fort Lauderdale, Florida, request is hereby made to the Wage and Hour Division of consideration and approval of the following plan under Section 584.4 of the Code of Federal Regulations.

The following agreement shall be executed at the time of employment.

> "It is understood that the employee is responsible for any money entrusted to him. Any shortages that occur through misappropriation, theft, or otherwise, shall be voluntarily repaid by the employee to the employer. In executing this contract at the time of employment, it is understood by both parties that the employee is the sole and only person using or entering into the safe, cash deposit box, or sole operator of a cash register.

> The employee agrees to voluntarily repay said missing funds to the employer within a reasonable period of time. The employer shall not deduct said shortages from the paycheck of the employee. It is understood that said shortages are considered to be a valid debt owed to the employer.
>
> Any repaid debts caused by such shortages shall not be considered as part of the calculation of basic rates of [880] employees and shall not be used to determine whether the employee has received pay amounting to less than the Federal minimum wage.
>
> Basic rates, used for calculation of overtime pay, shall not be reduced as a result of repayment of such debts. Said debt repayment is, for all purposes, unconnected with payroll procedures and concepts and are not to be considered as payroll deductions."

The employees covered by this agreement are clerks responsible for cash register receipts, change orders and other miscellaneous funds, in retail liquor stores owned by the employer. These employees are, for the most part, transient, short-term employees, in a resort area, who are paid at or little above the Federal minimum hourly rate.

The request is based upon this employer's right to enter into an agreement whereby his property right is protected. The security measures indicated in the retail business, nationally, are such that with high-volume business activity and the relatively short period of employment of most of the subject employees, high losses result.

This control is urgently needed to deter theft in retail stores which is fully substantiated in national survey reports.

All other conditions of payroll calculations are standard, including straight time pay at minimum or above level and time-and-one-half for all hours over forty (40) in any one week.

No justification can be made for considering this request connected with wage rates, since there is no time limit on repayment, no penalty for non-payment, and no provision to repay after termination of employment. This is not a payroll deduction.

I would appreciate it if you would advise me at the above address as soon as you have reached a decision with regard to this request.

Very truly yours,

/s/ James V. Johnstone
JAMES V. JOHNSTONE

JVH:ah

EXHIBIT NO. 2

[881] U. S. DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Division
Washington, D. C. 20210

Date: Oct 23 1969

Reply to Attn of: REX

Subject: Deductions from Wages for Cash Shortages

To: Mr. James V. Johnstone
Suite 244
420 Lincoln Road
Miami Beach, Florida 33139

Re: Mayhue's Super Liquor Stores
Fort Lauderdale, Florida

Dear Mr. Johnstone:

This is in reply to your letter of October 17, 1969, concerning the effect under the Fair Labor Standards Act of deductions made from employees' wages for cash shortages.

Deductions of this kind are considered illegal to the extent that they reduce the wages of the employees below the minimum required by the act or reduce the amount of overtime compensation due under the act. This is discussed in sections 778.307 of Interpretative Bulletin, Part 778

and sections 531.36 and 531.37 of Regulations, Part 531. You will also be interested in section 531.35.
Sincerely,

/s/ William Hoffman
by William Hoffman
Acting Director

Max Schiferl, Director
Division of Regulations
and Exemptions

2 Enclosures

[871]

[TITLE OMITTED]

PETITION FOR DECLARATORY JUDGMENT

Filed December 9, 1969.

COUNT I — PETITION OF MAYHUE'S SUPER LIQUOR STORES, INC., A FLORIDA CORPORATION

COMES NOW your Petitioner, MAYHUE'S SUPER LIQUOR STORES, INC., a Florida corporation, by and through its undersigned attorney, and files this its Petition for Declaratory Judgment and says:

1. This is a proceeding for declaratory relief under Section 28:1331 U.S.C.A.; 28:2201 U.S.C.A.; 28:1343 U.S.C.A. and 29:201 U.S.C.A., in addition to Rules 23a and 57 of the Federal Rules of Civil Procedure, for the purpose of determining a question in actual controversy between the parties hereto and the determination of the constitutionality of the Fair Labor Standards Act, a federal statute, and of the Secretary of Labor and the Wage and Hour and Public Contracts Division of the United States Department of Labor, with regard to interpretation of said federal statute and, more particularly, Title 29, Part 778, of the Code of Federal Regulations "Overtime Compensation" under the Fair Labor Standards Act of 1938, as amended, and further, Section 778.307 and Sections 531.36, 531.37 and 531.35 of the Interpretative Bulletin of the Wage and Hour Public Contracts Division of the United States Department of Labor.

2. The plaintiff is a Corporation, organized under the Laws of the State of Florida, and is owner and operator of retail liquor stores in the County of Broward, State of Florida, possessing licenses from the State of Florida and the Cities of Fort Lauderdale and Plantation, Florida, authorizing the sale of alcoholic beverages in packages, for consumption off premises, and operating liquor package stores within the above named cities. Further, the plaintiff has engaged in said business continuously and without interruption in the State of Florida from the date of its organization in May of 1964 to the date hereof and the plaintiff is at the present time engaged in said business.

3. That said business is well known throughout the City of Fort Lauderdale and Plantation, in the State of Florida, having been established for a long period of time and having maintained a good reputation and, by reasons thereof, has a good will value as a going business, constituting a valuable property right.

4. The plaintiff is a member of a class of retail stores and, pursuant to Rule 23a, this cause is being brought as a class action for the following reasons:

(a) The class is so numerous, consisting of hundreds of thousands of retail stores throughout the United States, that joinder of all members is impracticable.

(b) There are questions of law and fact common to all retail stores having employees at their place of business.

(c) The claims of the plaintiff are typical of the claims of the entire class of retail stores throughout the United States.

(d) The plaintiff, as a representative of the class, will fairly and adequately protect the interest of the class.

(e) There exists, at the present time, a genuine and present controversy between the plaintiff and the defendant and not merely a possible or conjectural controversy.

5. The defendant supervises an administrative department in the cabinet of the United States Government whereby hours of work and compensation paid to employees are regulated in accordance with administrative rulings and regulations.

[873] 6. On or about June 25, 1938, an Act was duly passed by the Congress of the United States and enacted into law, known as Public Law No. 718, Chapter 676, Third Section, Statute No. 2457, and also known as the Fair Labor Standards Act of 1938, which Act became in operation and effect on October 24, 1938, and which Act has been amended on numerous occasions since that date.

7. This action is also brought under a Civil Rights complaint for which the District Court of the Federal Judicial District of Southern Florida has jurisdiction, as the action is brought to redress the deprivation of a right and privilege secured by the Constitution of the United States, providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

8. Further, this action is brought on a unique federal question which is the interpretation of the appropriate section of the Fair Labor Standards Act, as hereinabove described.

9. For some time since the inception of his business, the plaintiff has been subjected to internal audits of agents of the Federal Government, to-wit: Compliance

Officers of the Wage and Hour and Public Contracts Division of the United States Department of Labor, working from Room 14, Romark Building, 3521 W. Broward Boulevard, Fort Lauderdale, Florida, whereby said agents, having examined the books and records and interviewed the plaintiff from time to time and transmitted the interpretations of the above described statute from the Secretary of Labor to the plaintiff, which have deprived the plaintiff of the full and adequate use of its private property, to-wit: its business and its money; have discriminated against it as a Corporation and as a retail business establishment, and have discriminated against it as a member of a class of retail establishments throughout the United States and, by so doing, have conducted a course of activities in behalf of the Secretary of Labor which have caused the plaintiff loss of profits, inefficiency in its [874] operations and the need to employ legal assistance.

10. Further, from time to time, the plaintiff has requested assistance from the agents of the above described administrative agency and has specifically requested the right to enter into an agreement with employees who have physical control of monies belonging to the plaintiff, whereby, in the event cash shortages occur through misappropriation, theft or otherwise, the employee shall voluntarily repay the plaintiff. The suggested agreement has no connection whatsoever with payroll and the repayment of said debt would never had been accomplished through a payroll deduction but it is understood that said shortages were to be considered a valid debt owed to the plaintiff. Further, it is understood that such shortages would not be considered a part of the calculation of basic rates of employees and would not be used to determine

whether the employees had received pay amounting to less than the federal minimum wage. It was explained to the agents of the administrative agency representing the defendant that the employees to be covered by this agreement were clerks responsible for cash register receipts, change orders, and other miscellaneous funds in retail liquor stores owned by the employer and that these employees were transient, short-term employees in a resort area who were paid at little above the federal minimum hourly rate. It was explained that the need for said security measure is clearly indicated on a national basis in the retail sales industry. In answer to this request, the agents of the Wage and Hour and Public Contracts Division, representing the Secretary of Labor, continuously disallowed this request and advised the plaintiff that this arrangement, as hereinabove described, would constitute "a payroll deduction" under Section 778 of the Interpretative Bulletin and Section 548 of the Code of Federal Regulations which are interpretative regulations of the Fair Labor Standards Act as hereinabove cited.

[875] 11. Further, the plaintiff instructed his attorney to file a written request with the Administrator of the Wage and Hour Division of the United States Department of Labor pursuant to the procedure as outlined in Section 548.40 in the Code of Federal Regulations on October 17, 1969, a copy of which written request is attached and filed herein and made a part of this complaint, and labeled as Exhibit "1". In the written request, it was made absolutely clear to the Administrator that the debt created by the shortage of cash, either by pilferage or whatever cause, was in no way to be connected with payroll but it was a debt owed by the employee to the employer and that said debt could be repaid at any time and further, that it

was by no means mandatory that the debt be repaid at all and, further, that there was no provision to repay the debt upon termination of employment for any cause.

12. In answer to the written request, as hereinabove described, the Administrator wrote on October 23, 1969, to counsel for the plaintiff and advised that in reply to the letter of October 17, 1969, the Department of Labor was arbitrarily classifying said method of repayment of debt as a "payroll deduction" and that, further, the suggested method was considered illegal. Completely disregarding the statement of counsel for plaintiff that there was no connection with payroll, the Department of Labor has arbitrarily taken the position that this repayment of a separate debt could be included in the computation of minimum wages under the federal law. A copy of this letter is attached and included in this complaint and made a part hereof and entitled Exhibit "2".

13. The above action, taken by the United States Department of Labor under the directorship of GEORGE SCHULTZ, Secretary, clearly established that the Secretary is depriving the plaintiff of his right to property, to-wit: money, without due process of law, in that there is no method allowed by the Secretary of Labor whereby cash shortages consisting of money misappropriated by [876] employees may be repaid to the employer.

14. This position deprives the plaintiff of its civil rights in that his constitutional right to protect its private property and its business is being violated and that the Secretary is discriminating against this plaintiff and all members of this plaintiff's class by disallowing such a system of repayment of debts.

15. Further, the right of the individual plaintiff not to be deprived of property without due process of law is a right secured by the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

16. Further, the plaintiff is in doubt as to the intention of the Fair Labor Standards Act whether or not said intention is to deprive the plaintiff, as hereinabove described, of its various constitutional rights and that plaintiff has been advised by the Law Enforcement Office of the Secretary of Labor's office that his intended system is prohibited under the Fair Labor Standards Act and any action in part of the plaintiff to violate the Fair Labor Standards Act, as interpreted by the Secretary of Labor, shall be prosecuted to the full extent of the law.

17. It is the opinion of the plaintiff that the interpretation of the Secretary and his agents, as hereinabove described, violates the Constitution of the United States of America and that, as such, the proper sections of said Act are illegal, unconstitutional and without force of law.

18. That the business conducted by the plaintiff is a valuable property and plaintiff has invested in said business a considerable amount of money in equipment, inventory, time and effort; that the plaintiff's principal force of business is retail sales in the State of Florida; that the plaintiff, due to the harrassment and inefficiency created by the interpretation of the Secretary, shall be irreparably damaged and plaintiff will be virtually put out of business unless the enforcement of said Act is restrained, pending [877] final adjudication and determination of the matters and issues herein set forth, and plaintiff will suffer irreparable injury and loss; that plaintiff

has no adequate remedy by an action at law for damages or other than by obtaining an injunction relief.

WHEREFORE, plaintiff prays for a declaratory judgment under Section 28:2201 of the United States Code anotated, declaring that the above described Sections of the Fair Labor Standards Act are inapplicable to the plaintiff or that same is void, unconstitutional and ineffective and without force of law, and that plaintiff thereby is not required to comply with the terms and provisions thereof; that the defendant, his agents and servants, be restrained and enjoined by the Order of this Court pending a final determination of the issues stated herein and, upon such determination, be permanently restrained and enjoined from exercising any of the powers, rights or duties, respecting the enforcement of said Act against the plaintiff insofar as it purports to confer such rights, powers and duties, upon said defendant, and that plaintiff may have its costs and such other and further relief as the Court may deem equitable.

COUNT II — PETITION OF CARL L. MAYHUE, d/b/a MAYHUE'S SUPER LIQUOR STORES

The plaintiff, CARL L. MAYHUE, d/b/a MAYHUE'S SUPER LIQUOR STORES, brings this action, by and through his undersigned attorney, and realleges Paragraphs 1 through 18 above and, in addition thereto, alleges the following:

19. The plaintiff brings this action, individually, and says that he is owner of one hundred per cent (100%) of the stock of MAYHUE'S SUPER LIQUOR STORES, INC., a Florida corporation.

20. That due to the action of the Secretary of Labor, as particularly described in Paragraphs 1 through 18 in Count I above, and as adopted in Count II completely and in every respect hereto, the plaintiff has been deprived of his individual constitutional protection as to his right of property without due process [878] of law and that the defendant herein has violated both the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

WHEREFORE, plaintiff prays for a declaratory judgment under Section 28:2201 of the United States Code anotated, declaring that the above described Sections of the Fair Labor Standards Act are inapplicable to the plaintiff or that same is void, unconstitutional and ineffective and without force of law, and that plaintiff thereby is not required to comply with the terms and provisions thereof; that the defendant, his agents and servants, be restrained and enjoined by the Order of this Court pending a final determination of the issues stated herein and, upon such determination, be permanently restrained and enjoined from exercising any of the powers, rights or duties, respecting the enforcement of said Act against the plaintiff insofar as it purports to confer such rights, powers and duties, upon said defendant, and that plaintiff may have its costs and such other and further relief as the Court may deem equitable.

/s/ James V. Johstone
JAMES V. JOHNSTONE
Attorney for Plaintiffs
420 Lincoln Road, Suite 244
Miami Beach, Florida 33139

[968]

[TITLE OMITTED]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the Court, sitting without a jury, on November 17, 18 and 19, 1970. Having heard and considered the testimony, the stipulations of the parties, the exhibits, all the admissible evidence and the arguments of counsel, now in accordance with Rule 52(a), Federal Rules of Civil Procedure, the Court hereby finds the facts specially and concludes the law thereon as follows:

FINDINGS OF FACT

1. This action was instituted by the plaintiffs Mayhue's Super Liquor Stores, Inc., and Carl A. Mayhue, individually, under the provisions of 28 U. S. Code §2201, and seeks a declaratory judgment against James D. Hodgson, Secretary of Labor, United States Department of Labor, with respect to the legality or illegality of requiring employees of plaintiffs to refund cash register shortages. The Secretary of Labor, hereinafter referred to as the Secretary, answered the petition for declaratory judgment by denying the legality of such refunds or deductions for cash register shortages [969] and counterclaimed for an injunction pursuant to 29 U. S. Code §217 alleging that plaintiffs have been and are wilfully violating the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, et seq.), hereinafter referred to as the Act. The Secretary also seeks an order restraining the plaintiffs from withholding and continuing o withhold unpaid wages due plaintiffs' employees as a result of plaintiffs' alleged violations of the Act.

2. Plaintiff Mayhue's Super Liquor Stores, Inc., is a corporation, with a place of business and doing business in Broward County, Florida, where it has been and is engaged in the operation of a chain of retail stores selling liquor and spiritous beverages.

3. Plaintiff Carl L. Mayhue resides in Broward County, Florida, where he is and at all times relevant to this action was the president and principal stockholder of plaintiff Mayhue's Super Liquor Stores, Inc. Carl L. Mayhue actively manages, supervises and directs the business affairs and operations of the plaintiff corporation including the hiring and firing of employees and the setting of wage policies.

4. At all times hereinafter mentioned, plaintiffs performed related activities through unified operation and common control for the purpose of engaging in the retail liquor business. Plaintiffs have and have had employees who were and are regularly engaged in commerce or in the production of goods for commerce including employees handling, selling or otherwise working on goods that have been moved in or produced for commerce.

5. Plaintiffs operated their liquor stores on a seven day basis usually from 8:30 a.m. until 10:00 p.m., except for Sundays when the schedule varied from store to store. Employees [970] were assigned scheduled shifts to work as cashiers, assistant managers and sales clerks. Plaintiffs maintained daily time cards which reflect the scheduled hours for each employee but the court finds from the evidence, including the testimony of employees, that these records do not accurately reflect all hours worked by the said employees. Plaintiff's employees were required to

report for duty before the shift began for the purpose of counting and verifying the cash used in making sales, dusting the cash registers, counters and liquor bottles in stock, and reading the "employees' training manual." Likewise, employees were required to remain on the premises after the end of the scheduled shift for the purpose of balancing out their cash drawer, tallying the various denominations of bills, entering certain information with regard to cash on plaintiffs' forms, placing money in a zippered bag and attaching the form, and in the case of employees on the last shift, remaining at the store until the other employees had completed their tasks since plaintiffs' policy requires all employees to leave the store at the same time. Likewise, employees were periodically required to take a polygraph test as well as a test regarding company check-cashing procedures on their own time. Defendant made no attempt to record the amount of time consumed in performing the above duties nor were employees compensated for the time so spent. This court concludes that these duties fall clearly within "hours worked" by said employees and that such time is compensible.

In the absence of records upon which a precise determination could be made regarding the amount of time so spent, the court must make a determination based upon the just and reasonable inferences drawn from the evidence. The court finds employees averaged at least 10 minutes per day in unpaid hours worked.

[971] 6. With regard to the above finding, it becomes a matter of mathematical computation to find the differences between the amounts actually paid to plaintiffs' employees and the amounts they would have been paid if plaintiffs had compensated said employees for their actual

hours of employment. Based on 10 minutes per day of uncompensated time, the gross amount plaintiffs have withheld and continue to withhold has been computed and is set forth with respect to each employee as shown on Exhibit "A".

7. In the fall of 1965, the plaintiffs were contacted by Jose Fernandez, Compliance Officer, Wage and Hour and Public Contracts Divisions, United States Department of Labor, for the purpose of ascertaining whether plaintiffs' business operations were in compliance with the Act. As a result of this investigation, the Plaintiffs were advised that employees were being required to perform work both before and after scheduled shifts, but were not being compensated for such time; plaintiffs were advised that such a practice violated the minimum wage, overtime and recordkeeping requirements of the Act. The plaintiffs were also advised that their failure to count and compensate employees for work performed before and after scheduled shifts also violated the overtime provisions of the Act to the extent that it brought said employees' wages in those workweeks in which employees worked in excess of 40 hours below one and one-half times such employees' regular rate for said overtime hours. Plaintiffs were further advised that their failure to record work performed by employees before and after scheduled shifts violated the recordkeeping provisions of the Act.

At the conclusion of the investigation, plaintiffs agreed to comply in the future.

[972] 8. On October 17, 1969, plaintiffs requested an opinion from the Administrator, Wage and Hour and Public Contracts Divisions, United States Department of Labor, with respect to the legality or illegality of a pro-

posal which would require employees to repay plaintiffs for cash register shortages. On October 23, 1969, plaintiff received a reply to his request for an opinion and was advised that such deductions are illegal to the extent that they reduce an employee's wages below the applicable minimum wage.

9. The proposal was to cover money entrusted to employees by the employer and reads as follows:

> "It is understood that the employee is responsible for any money entrusted to him. Any shortages that occur through misappropriation, theft, or otherwise, shall be voluntarily repaid by the employee to the employer. In executing this contract at the time of employment, is is understood by both parties that the employee is the sole and only person using or entering into the safe, cash deposit box, or sole operator of a cash register.
>
> The employee agrees to voluntarily repay said missing funds to the employer within a reasonable period of time. The employer shall not deduct said shortages from the paycheck of the employee. It is understood that said shortages are considered to be a valid debt owed to the employer.
>
> Any repaid debts caused by such shortages shall not be considered as part of the calculation of basic rates of employees and shall not be used to determine whether the employee has received pay amounting to less than the Federal minimum wage.

Basic rates, used for calculation of overtime pay, shall not be reduced as a result of repayment of such debts. Said debt repayment is, for all purposes, unconnected with payroll procedures and are not to be considered as payroll deductions."

[973] This agreement was discussed with each employee to which it would apply prior to execution and was an integral part of the "employment."

10. An official investigation was made of plaintiffs' operations in October of 1969, and Wage-Hour Compliance Officers Clarence Reid and Henry Latimer advised plaintiffs that there continued to be repeated violations resulting from certain of plaintiffs' pay practices. Plaintiffs were again advised that employees were required to perform work both before and after scheduled shifts, but that such time was not counted as hours worked and not compensated.

At the conclusion of the October 1969 investigation, plaintiffs again were advised about the applicability of the Act to their business operations and their employment, pay practices and recordkeeping practices.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter.

2. Both the corporate plaintiff and individual plaintiff were and are employers within the meaning of the Act of employees, including those named on Exhibit "A" hereto, and are jointly and severally liable for all the relief sought herein.

3. The employees described in the above findings were at all pertinent times herein employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of sections 3(r) and 3(s) of the Act.

4. Plaintiffs repeatedly have violated the minimum wage, overtime and recordkeeping provisions of sections 6, 7, 11(c), 15(a) (2) and 15(a) (5) of the Act.

[974] With respect to plaintiffs' employees named on Exhibit "A", the failure of plaintiffs to maintain records which reflect accurately all of the daily and total weekly hours worked by said employees, as found in Findings of Fact numbers 5 and 6 above, makes it necessary to determine the extent of hours worked by said employees as a matter of just and reasonable inference. Thus, the amounts of underpayments to these employees may be computed even though the result be only approximate. Anderson v. Mt. Clemens Pottery Company, 328 U.S. 680, 686-687 (1946). Accordingly, the extent of the minimum wage and overtime violations is in the amount of $2,887.62. The aforesaid amounts are due to the employees for the periods of their employment as shown on Exhibit "A".

5. In 1966, Section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. §255, was amended so that the statute of limitations on recovery of minimum wages and overtime compensation due under the Fair Labor Standards Act is two years after the cause of action accrues except that a cause of action arising out of willful violation may be commenced within three years after the cause of action accrues. These limitations are incorporated in section 17 of the Fair Labor Standards Act as amended. Since the

Port-to-Portal Act limitations apply to civil actions, the term "willful" which was added by the 1966 amendment must be construed in the civil sense. It therefore applies to violations which are intentional, knowing or voluntary as distinguished from accidental and it is used to characterize conduct marked by careless disregard whether or not one has the right to so act. United States v. Illinois Cent. R. Co., 303 U.S. 239, 243; 58 S.Ct. 533, 535. The violations in this case were willful within the meaning of the Portal-to-Portal Act and restitution of minimum wage and overtime [975] compensation shall be ordered for such violations which accrued no more than three years before this action was filed. Hodgson v. Ted O. Hyatt and Opal Hyatt, d/b/a Ted's Plumbing and Repair, 63 Lab. Cas, ¶32,375.

Accordingly, defendant is entitled to an order enjoining and restraining the plaintiffs, jointly and severally, from withholding payment of minimum wage and overtime compensation herein found by the court to be due their employees. Since the court concludes the violations were willful within the meaning of the Act, the court will allow recovery for the three year period preceding the filing of this action.

6. In view of the circumstances under which these repeated violations of the Act occurred, the Secretary is entitled to a permanent injunction. Goldberg v. Cockrell, 303 F.2d 811 (CA 5, 1962).

7. With regard to plaintiffs' petition for a declaratory judgment against the Secretary, the court declares and concludes, as a matter of law, that the plaintiffs' agreement with its employees entrusted with money as

set forth in paragraph 9 of the Findings of Fact, in no way violates the provisions of the Act. To hold otherwise would amount to a "judicial invitation" to such employees to steal. Certainly the Act is not intended to prevent an employer from protecting his property, including assets in the form of cash. Such losses, however, should not be deducted from the employees pay whether wages are being paid in cash or by check. The agreement being approved by the court contemplates "voluntary" repayment by employees. Any contrary action by the employer would, in the court's opinion, violate the provisions of the Act.

[976] 8. The court concludes that the following monies were either deducted from the respective employees pay checks or from the amount of cash handed to them as wages and consequently not "voluntary" repayments within the terms of this order:

(a) Rea Perkins	$12.00
(b) Pauline McClure	15.62
(c) Lois Haven	42.00
(d) Alberta Meier	21.00
(e) Charles Barney	28.18
(f) Ramona Magers	12.21

These sums are due to the employees listed above.

9. It is the obligation of the employer to establish some system whereby employees are advised of "cash shortages"; afforded an opportunity to review the records involved and given an opportunity to decide for themselves whether such "voluntary" repayments should be made.

In the absence of some agreement by the employer and employee, the employer may avail himself of such legal processes he deems appropriate; but, the employer may not forcibly deduct such monies.

Let Judgment be entered accordingly.

DATED this 26th day of January, 1971.

/s/ Peter T. Fay

UNITED STATES DISTRICT JUDGE

Employment Agreement of Mary Barnhart

Date 10-16-68

It is fully understood that I am responsible for shortages which occur in the cash register of which I am in charge, with the understanding that I am the sole operator of the particular cash register.

These are the terms and conditions of my employment which are acceptable to me.

This will authorize you to deduct from any moneys due me the amount of shortages which may occur.

Signed Mary Barnhart

Time Cards are maintained in an accessible position in each Store. You are required to record your time of work on your Time Card. Sign out and in for lunch and dinner periods and when you go off duty at the end of your work period.

If you are a Cashier, at the conclusion of your check-out of your cash register, your work period is over. You are not permitted to work after check-out for reasons of security of money.

Signed Mary Barnhart

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-642

MATHUE'S SUPER LIQUOR STORES, ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. Petitioners, who own and operate a chain of six retail liquor stores in Broward County, Florida, sued the Secretary of Labor for a declaratory judgment that an employment contract in which their cashiers agreed to "voluntarily repay" any and all cash register shortages would not violate the Fair Labor Standards Act even though the "voluntary payments" reduced their wages below the minimum prescribed by the Act. The Secretary counterclaimed for an injunction against further violations of the Act and for an order restraining the continued withholding of unpaid wages resulting from petitioners' practice of not paying for all hours of work and their further practice of recouping shortages, either by payroll deductions or by requesting the cashiers to make up the shortages.

491-207—72——1

The district court ruled in favor of petitioners in the declaratory judgment action and in favor of the Secretary on the counterclaim (Pet. App. 23–32). On appeal, the court of appeals affirmed the portion of the ruling upholding the Secretary's counterclaim and reversed the ruling in the declaratory judgment action. With respect to the latter, the court held that an agreement whereby the employee obligates himself to repay cash register shortages as a condition of his employment violates the minimum wage provisions of the Fair Labor Standards Act to the extent that the repayments result in a reduction of earnings by the employee below the statutory minimum wage, even though the repayment does not take the form of a direct deduction from wages.

2. Petitioners' sole challenge to the decision of the court of appeals is that its disapproval of their proposed employment agreement violates their freedom of contract guaranteed by the Fifth Amendment, citing in support of this contention two decisions rendered by the Court during the early 1900's, *Lochner* v. *New York*, 198 U.S. 45, and *Coppage* v. *Kansas*, 236 U.S. 1. However, petitioners overlook the fact that the same freedom of contract argument was subsequently advanced and rejected by the Court in its first decision under the Fair Labor Standards Act. See *United States* v. *Darby Lumber Co.*, 312 U.S. 100, 108, 125. Moreover, since *Darby* the courts, including this Court, have consistently held that "private contracts" which have the effect of "circumventing or invading the command of the Wage and Hour Act" are invalid. See, *e.g.*, *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 706;

Mitchell v. *Turner*, 286 F.2d 104, 106 (C.A. 5); *Handler* v. *Thrasher*, 191 F.2d 120, 123 (C.A. 10); *Cascrta* v. *Home Lines Agency, Inc.*, 273 F.2d 943, 946 (C.A. 2). Here, as the court of appeals noted, the recoupment required by the proposed agreement, whether voluntary or not, and whether paid for "out of [the employees'] wages or other resources," will reduce the amount of their wages, and when they are "reduced below the required minimum wage, the law is violated" (Pet. App. 6).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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DECEMBER 1972.

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